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DRAFT REPORT OF THE INTERGOVERNMENTAL GROUP OF EXPERTS ON RESTRICTIVE BUSINESS PRACTICES ON ITS ELEVENTH SESSION

Held at the Palais des Nations, Geneva,
from 23 to 27 November 1992

Rapporteur: Mr. Donald Partridge (Canada)

Addendum

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REVIEW OF THE OPERATION OF AND EXPERIENCE ARISING FROM THE APPLICATION AND IMPLEMENTATION OF THE SET OF MULTILATERALLY AGREED EQUITABLE PRINCIPLES AND RULES FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES

(Agenda item 3)

ACTIVITIES RELATING TO SPECIFIC PROVISIONS OF THE SET:

(a) STUDIES ON RESTRICTIVE BUSINESS PRACTICES RELATED TO THE PROVISIONS OF THE SET OF PRINCIPLES AND RULES;

(b) INFORMATION AND CONSULTATIONS ON RESTRICTIVE BUSINESS PRACTICES;

(c) THE MODEL LAW OR LAWS FOR THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES AND THE HANDBOOK ON RESTRICTIVE BUSINESS PRACTICES LEGISLATION;

(d) TECHNICAL ASSISTANCE, ADVISORY AND TRAINING PROGRAMMES ON RESTRICTIVE BUSINESS PRACTICES

(Agenda item 4)

WORK PROGRAMME ON RESTRICTIVE PRACTICES

(Agenda item 5)

22. The representative of Italy described some features of the Italian competition law adopted in October 1990, which followed the same general approach as the model law. The law applied equally to private and public sector enterprises. The competition authority was responsible to Parliament so as to ensure its independence. It had the competence to recommend changes in legislation to make it conform more closely to competition principles, thus ensuring that the authority dealt not only with antitrust but also with competition policy. In the exercise of its power, the authority had intervened in highly regulated sectors such as telecommunications, public procurement and retail trade. Its experiences with respect to enforcement against RBPs were similar to those of other competition authorities. Intervention had been particularly necessary in the cement, dairy products and waste disposal industries.

23. The representative of Sri Lanka said that the Fair Trading Commission, which had come into operation in 1987, could investigate monopoly situations and anticompetitive practices, but mergers only after their creation. According to a proposal accepted by the Sri Lankan Cabinet, the Fair Trading Commission Act No. 1 of 1987 was to be amended to allow for investigations of proposed mergers. In recent weeks his country had lifted price controls on bread and wheat flour, leaving pharmaceuticals as the sole item under such control. With the repeal of sections 18 to 26 of the Fair Trading Commission Act and the removal of price surveillance, his Government envisaged a full-fledged market economy where firms could compete freely.

24. He noted that the revised draft of the UNCTAD study on Concentration of Market Power (TD/B/RBP/80/Rev.1), had taken into account the comments made at the tenth session of the IGE and requested the secretariat to finalize the study. In connection with the outline of a possible new study on "Competition policy issues related to industrialization in developing countries" prepared by the secretariat, he stated that the salient features of the new industralization policy in Sri Lanka were to encourage private sector industrialists to play a key catalysing and generative role in the rapid development of industry countrywide, to encourage export-oriented industries, and to introduce a new programme of industrial reform coupled with a rationalized tariff structure. An Industrialization Commission had been set up in January 1991 to coordinate industrial programmes and policies.

25. His Government had given every encouragement for foreign investment, and many international companies, from both the developed and developing countries, had invested in various industries in Sri Lanka. The three Free Trade Zones established for better coordination had been brought under one roof and redesignated a "Free Economic Zone". This had been further expanded by extending the incentives to cover export industries in any part of the island. He added that as many as 60 public sector corporations and boards had been privatized or given wholly or partly to the employees during the preceding three years; these ranged from textile mills to companies producing chinaware, distilleries, fertilizer plants, shipping lines and cement plants, among others. The new owners in the private sector were both international and local and included companies from Japan, Norway, Switzerland, the Republic of Korea, India and a number of other countries.

26. The representative of the United Kingdom of Great Britain and Northern Ireland stated that the Government had recently confirmed its commitment to replace the Restrictive Trade Practices Act (the Act) 1976, which dealt with agreements, by new legislation. The existing Act was restricted to agreements dealing with goods and was based on the structure of the agreement. An agreement which fell within the provisions of the Act it had to be registered with the Director-General of Fair Trading who was under a duty to refer it to the Restrictive Practices Court which would strike down agreements if they were against the public interest. The Government had concluded that the present system in the Act was inflexible and slow; it was too often concerned with harmless agreements and failed to direct itself adequately against anticompetitive agreements. New legislation was to be introduced when Parliamentary time could be found, based on provisions similar to those found in Article 85 of the Treaty of Rome. An agreement would be covered by the new Act if its object or effect was to restrict competition in the United Kingdom.

27. The United Kingdom attached great importance to competition and the need for Member States to have and to enforce competition laws. The work carried out by the UNCTAD secretariat on the Model Law would be helpful. Those countries that had competition laws and had experience in their application could assist those wishing to introduce such laws. The help that could be given was set out in the agreed resolution of the Second Review Conference in 1990. Since the tenth session of the Intergovernmental Group, the United Kingdom had given considerable involved technical assistance to other countries. Staff from the Office of Fair Trading had made a total of six overseas visits to provide technical assistance (twice to the Russian Federation, twice to Czechoslovakia, once to Lithuania and once to China) with the aim of assisting these countries to set up and develop their competition laws. Further, the United Kingdom had a total of 37 visits from 23 different countries from all parts of the globe; as well as several attachments to the Office. These visitors had come from Kenya, China, Jamaica and Russia.

28. The secretariat had developed a checklist for consultations, which should be useful, but it must be a flexible guide. Countries should not feel inhibited from approaching competition authorities who might be able to help them, by the formidable detail of the checklist.

29. The annual IGE session provided an excellent forum for an exchange of experiences among competition experts. In that respect the United Kingdom welcomed the movement since UNCTAD VIII towards a more flexible pattern of work in UNCTAD meetings. The secretariat was to be congratulated on the admirable quality of the papers produced for the session.

30. The representative of Canada stated that the competition policy in Canada had a long history of more than a hundred years. The modernization of competition law had been a long and intensely debated public policy issue. The process had begun in 1965 with a reference to the Economic Council of Canada and the first stage had been completed only in 1976 with the extension of the Act to the service sector. This process had culminated in 1986 with the passage of the Competition Act and the Competition Tribunal Act. The changes made included new investigation procedures to bring them into compliance with the 1982 Charter of Rights and Freedoms, a new civil merger review process and a modern provision on the abuse of dominant positions.

31. One of the major challenges for antitrust enforcement in recent years had been to withstand the numerous challenges under the Canadian Charter of Rights and Freedoms to various aspects of the law, both substantive and procedural. While a number of trial decisions had hindered progress in several important cases, the courts had signalled their endorsement of the policy underlying several key provisions of the Competition Act, considerably reducing the uncertainty regarding the enforceability of such positions.

- The constitutionality of the price-fixing provisions of the Act had been unequivocally upheld by a unanimous judgement of the Supreme Court of Canada.
- In July of 1992, the Supreme Court had upheld the power of the Competition Tribunal to enforce its decisions through contempt orders. The case in question concerned contempt proceedings before the Tribunal against Chrysler Canada for not following the terms of its order to resupply an auto parts exporter.
- The Supreme Court had upheld the constitutionality of the misleading advertising provisions of the Act.
- The Supreme Court had denied leave to appeal from a unanimous appellate court decisions affirming the constitutionality of the merger provisions of the Act as well as that of the Competition Tribunal.

- The Competition Tribunal had recently issued decisions in the first two fully-contested merger cases under the 1986 Competition Act as well as its second abuse of dominance decision.
- In the Laidlaw case, proceedings had been initiated before the Competition Tribunal under the abuse of dominance provisions of the Competition Act. The application had sought relief with respect to conduct, in particular, the use of restrictive covenants in contracts, "sham" litigation and acquisition of small competitors, which were designed to create and protect a dominant market position in waste removal services.

32. Enforcement guidelines, in particular, had become an important tool in the Bureau of Competition's efforts to articulate and clarify its enforcement policies and practices. In the past year, it had published guidelines on Price Discrimination and Predatory Pricing to add to the earlier guidelines concerning Mergers and Misleading Advertising.

33. The representative of Egypt underlined the importance of the current session of the Intergovernmental Group, as the first session after UNCTAD VIII. The Conference had strengthened the IGE mandate with regard to policies and rules for the control of RBPs in order to encourage competition, to promote the proper functioning of markets and efficient resource allocation, and to bring about further liberalization of international trade. The latter was important in view of the expected results of the Uruguay Round of trade negotiations, which were about to establish a new world trade order. Egypt was clearly committed to the Set of Principles and Rules adopted in 1980, as could be seen from the transformation under way, in his country, with a view to establishing a market economy. Reforms undertaken in that respect included the elimination of government restraints on trade and, in particular, import liberalization. Increased importance was attached to the private sector of the economy. While no comprehensive legislation to control RBPs was in existence, Egypt had taken measures to allow competition to play its role in full in the economy, and that would undoubtedly have favourable results. He noted, however, that while developing countries liberalized their economies in the interests of competition, developed countries and, in particular their transnational corporations, did not fully comply with agreed principles and rules. He felt that the Set should be made mandatory and applied to all States.

34. With respect to the Model Law, he emphasized the importance of its economic development objective. He hoped that the text would be agreed upon and that a final version would be made available as soon as possible.

35. He also drew attention to the need for technical assistance in the area of RBPs, as called for in the Set. He further emphasized the need for the IGE to give more extensive consideration to RBPs in services sectors of interest to developing countries, and to cooperate in that area with the Standing Committee concerned with services.

36. The representative of Czechoslovakia stated that the economy of his country was in transition from central planning to a market economy, and the transitional phase was characterized by low levels of competition. He noted that, in the privatization of many State-owned businesses which was taking place in his country, special attention was devoted to exposing the privatized firms to market forces. Hence, great opportunities to strengthen competition were created in the process. He said that the Competition Protection Act No. 63, which had come into force on 1 March 1991, provided the legal framework for protection against illicit restraints to competition. The commitments resulting from the Set of Principles and Rules were covered in the Act. Authority to control competition was vested with the Ministry for Economic Competition in the Czech Republic and with the Slovak Antimonopoly Office in the Slovak Republic. He added that the activities of the antimonopoly offices focused on the following areas: (i) cartel agreements, mergers, abuse of dominant position of entrepreneurs in the market; (ii) opinions on analyses of privatization projects of companies with a monopolistic or dominant position; (iii) realization of other provisions for stimulating economic competition, for example in the field of public procurement and the regulation of natural monopolies. The antimonopoly offices attached particular importance to international cooperation and the sharing of experiences with the competition authorities of other countries and organizations with which contacts had been established.

37. The representative of the Commission of the European Communities stated that the Commission fully endorsed the main objectives of the Set of Principles and Rules, namely to ensure that RBPs did not impede or negate the realization of the benefits that should arise from the liberalization of

tariff and non-tariff barriers. The Commission conformed to that objective of the Set with respect to both its internal and its external trade. The Community's competition rules were comprehensive and covered a broad range of issues. In addition to active application of the rules to both private and public enterprises, the Commission had recently increased its efforts to enforce the competition rules in so far "forgotten" sectors such as public utilities, in order to ensure that real competition existed in all sectors, including telecommunications, energy, water and transportation. The community also included State aids in its control of competition.

38. The Community had been trying to negotiate comparably comprehensive competition rules in its bilateral trade agreements with a number of other nations, including the developing countries. There were important competition components in the agreements with Poland, Hungary and Czechoslovakia. This was also true of the European Economic Area Agreement, which was expected to enter into force on 1 January 1993, and of agreements with developing countries of Latin America, Africa and Asia. The European Community fully recognized the importance of competition policy as a tool to liberalize trade and was willing to provide technical assistance to developing and other countries in that area.

39. The representative of the Republic of Korea said that his country had enacted the Monopoly Regulation and Fair Trade Act in April 1981, one year after the adoption of the Set of Principles and Rules, and had established its Fair Trade Commission under that Act. In the initial stage of the Act's implementation, the Commission had mainly regulated unfair business practices, such as unreasonable refusals to deal, discrimination of prices and of other terms of transactions, and abuse of dominant position. Since the mid-1980s, the Commission had focused its efforts on strengthening measures against concentration of market power, and unfair business practices. In order to achieve those objectives more effectively, the Act had been amended three times: in 1986, 1989 and 1992.

40. He said that the Fair Trade Commission had served to stimulate free and fair competition in his country, and this had led to the enhancement of consumer welfare and the competitiveness of domestic firms. These positive results were reinforced by active deregulation measures in various areas,

including liberalization of foreign trade and investment, which brought additional competition into the country. Furthermore, the Commission was strictly enforcing several measures under the Act to restrict the concentration of economic power. In fact, in November 1992, his country had just revised the Fair Trade Act to strengthen restrictions on cross-ownership and capital investment limits for large business groupings. He stated that the Commission had also been active in controlling the collusive activities of firms and RBPs by trade associations. Moreover, it had strengthened its cooperation with foreign competition authorities and relevant organizations. For example, in September 1991, Korea had hosted the International Conference on Competition Policy and Economic Growth cosponsored by the Korean Development Institute (KDI) and UNCTAD.

41. In conclusion, he drew attention to anticompetitive practices, such as voluntary export restraints and orderly market agreements, which led to export cartels. Those restraints needed to be properly addressed by UNCTAD.

42. The representative of the Philippines stated that her country had undertaken a comprehensive economic restructuring programme characterized by an aggressive market orientation strategy. In the 1990s, the Government had launched an autonomous liberalization programme reducing tariff and non-tariff barriers to trade. Market-friendly policies had also been adopted in other areas of the economy. In June 1991, the Government enacted into law the Foreign Investment Act which would allow automatic entry of 100 foreign equity investments except in a limited number of areas. A significant step towards deregulation had also been taken in the current year with the liberalization of the foreign exchange regime. Her country had also embarked on an aggressive privatization programme with the setting up of the Committee on Privatization. Legislation was also pending on the restructuring of the banking system.

43. She indicated that a review of the competition laws and policies in the Philippines could be found in UNCTAD documents TD/B/RBP/89 and ITP/63. National policy against unfair competition was enshrined in the Constitution itself and found expression in some legislative and administrative acts administered by several government agencies, such as the Department of Trade and Industry, the Securities and Exchange Commission, the Central Bank, etc.

Efforts were being made to strengthen and rationalize competition laws in pending legislation and bills aimed at: (1) adoption of a comprehensive and integrated competition law; (2) institution building through the establishment of an antitrust Commission; and (3) strengthening of an enforcement mechanism through the creation of an office for the antitrust prosecutor. She added that national efforts in that area had been given generous technical support by international institutions such as UNCTAD. On 20-21 November 1991, a regional workshop on RBPs had been held in Manila for ASEAN countries with the participation of experts from Norway and the Netherlands.

44. She observed that the discussions in the IGE had been devoted almost exclusively to an inward-looking examination of national RBP policies. However, domestic competition laws were designed, through limitations on jurisdiction, to promote national economic interests only and did not reconcile the conflicting interests of different countries. It would, perhaps, be opportune at the present time to explore the possibilities of advancing international cooperation relating to unfair competition practices. First, the Set should be strengthened by giving it a legally binding character. Initiatives had been made in other forums and the same could be done in the IGE. In the Uruguay Round negotiations, provisions on business practices had been included in the draft agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the General Agreement on Trade in Services (GATS). The provisions called also for national legislation in addressing RBPs and, at the international level, for the sharing of information and the mechanisms for consultation. Secondly, there was scope for addressing anticompetitive behaviour within the overall multilateral framework. It was often repeated that activities of private firms outside their home countries were exclusively a matter for the competition laws of the host countries concerned. However, domestic competition laws alone provided an imperfect means of protecting the vitality of present-day competition. A study conducted in 1991 under the auspices of the World Bank entitled The Basics of Anti-Trust Policy showed that international and domestic competition policies were mutually reinforcing. An example was given of the United States and EC antitrust policies which applied to economic exchanges

not only within the State or member country concerned but also to activities outside the State or national border. The IGE could learn from the United States and the EC in developing cooperation for the control of RBPs across national frontiers.

45. The representative of France drew attention to the multilateral consultations scheduled to take place at the present session at which his delegation had volunteered to make a presentation on the topic of "The rights of defendants in competition investigations and proceedings". In this connection, his Government had submitted a background text, which was available in document TD/B/RBP/91. He said that the IGE was an excellent forum for contacts between competition authorities of all countries of the world.

46. As to what concerned the enforcement of the competition law, he stressed the three main points characterizing the action of the French authorities. These were (i) regulation of competition to promote market equilibrium, (ii) respect for the principle of transparency in the relationships between economic partners, and (iii) daily action to promote loyalty in commercial transactions.